No. 2660

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EL DORA OIL COMPANY, J. L. CAMPBELL, H. M. JACKSON and JOHN SHRADER, doing business under the firm name of OHIO VALLEY CONSTRUCTION COMPANY, and JOHN SHRADER and T. J. GREEN,

Appellants,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

MEMORANDUM OF AUTHORITIES

Cited on Oral Argument of A. L. Weil.

Filed this.....day of November, 1915.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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This is an appeal from an order appointing a receiver.

The one and only point that we desire to urge upon the attention of the court is whether or not the court below had jurisdiction to make this order.

It is our contention that as the bill of complaint in this case alleges that the defendants are in possession of the land the plaintiffs have an adequate remedy at law in ejectment.

We further urge that where the bill alleges that the defendant is in possession, equity has no jurisdiction of an action to recover possession or to remove a cloud or to quiet title, even though other relief be asked which is ordinarily of equitable cognizance, such as an accounting, an injunction or the appointment of a receiver.

The authorities are practically unanimous that a court of equity has no jurisdiction in such a case as this.

Johnston v. Corson, 157 Fed. p. 145.

This was an action by plaintiff against defendant in possession to remove cloud, for an accounting, for an injunction against mining and to compel surrender of possession.

The allegations of the bill showed the defendants to be naked trespassers.

This court through Hunt, D. J., reviewed the authorities at great length and said:

> "Where there is a legal title and one who holds it is kept out of possession by defendants holding adversely, the remedy is at law to recover possession. 'Equity in such cases has no jurisdiction unless its aid is required to remove obstacles which prevent a successful resort to an action in ejectment, or when, after repeated actions at law its jurisdiction is invoked to prevent a multiplicity of suits or there are other specific equitable grounds of relief.' * * * That ejectment ordinarily affords ample remedy to recover mesne profits cannot be disputed, that it affords ample remedy to recover possession cannot be disputed; and

that damages can be recovered in ejectment is also certain." * * *

"It is well established that where a plaintiff is not in possession and defendant is, a suit to quiet title is not within the jurisdiction of a court of equity where other relief as well is sought, and this is true even though a number of additional reliefs is sought, part of which may be included within the jurisdiction of equity."

"Manifestly the principal issue involved in the case and the one which should be tried first is right of possession against defendants in possession, and defendants have a right to stand on their possession until compelled to yield to better title and to demand trial by jury as to whether plaintiff has a true title."

In

Cosmos Exploration Co. v. Gray Eagle Oil Co., 112 Fed. p. 4.

The suit was to restrain waste in removing oil, to quiet title and for a receiver. It was held that ejectment was the proper remedy, the acts charged in the bill being such as necessarily to imply an actual possession or occupancy of the land by defendant.

In

Lawson v. U. S. Mining Co., 207 U. S. p. 9,

it was held that a state statute

"cannot be relied upon to sustain a bill in equity by one out of possession against one in possession for an action at law in the nature of ejectment affords perfectly adequate legal remedy."

See also

Black v. Jackson, 177 U. S. 349, 361.

In

Boston & Montana Consolidated Mining Co. v. Montana Ore Purchasing Co., 188 U. S. 632,

the bill alleged that defendants entered plaintiff's lands and removed ore, and asked for an accounting and an injunction against continuing trespasses. The court said:

> "A bill of peace or to quiet title is defective because there is no allegation that the complainant was in possession which is necessary in such a bill. If not in possession an action of ejectment would lie."

On the issue of jurisdiction on the ground of multiplicity of actions we refer to

McGuire v. Pensacola City Co. et al., 105 Fed. 677, 679 (5th C. C. A.)

in which it was held:

> "If defendants are trespassers having obtained possession by force or violence as alleged they may all be joined as defendants in one action of ejectment. But even if a number of suits were required to settle the controversy as to the lands, each defendant would have the right to submit his claim of title and right to possession to a jury."

The only question that remains for discussion is whether this universally accepted rule is changed by the circumstance that the government is plaintiff.

No theory of constructive possession following the legal title can avail in an action where actual possession is alleged to be in the defendants. The fact that the United States is the plaintiff does not alter the general rule of law above referred to. The United States, when it comes into court as a litigant stands on exactly the same footing as any other litigant, and is subject to the same rules of procedure unless otherwise provided by special statutory enactment.

In

Hemmer v. U. S., 204 Fed. 901,

the court said:

> "In a suit in equity the claims of the government appeal to the conscience of the chancellor with no greater or less force than those of a private individual under similar circumstances."

Central Trust Co. v. Treat, 192 Fed. 942.

> "When the United States sues or consents to be sued even in its own courts, it becomes a litigant and is to be treated like any other litigant except where it is otherwise provided by law."

U. S. v. Stinson, 197 U. S. 200.

> "The government is subject to the same rules respecting the burden of proof, the quantity and character of the evidence, the presumptions of law and of fact that attend the presentation of a like action by an individual."

State of Iowa v. Carr, 191 Fed., p. 266.

> "When a sovereignty submits itself to the jurisdiction of a court of equity and prays its

> aid, its claims and rights are judicable by every other principal and rule of equity applicable to the claims and rights of private parties under similar circumstances."
>
> *U. S. v. Devereaux,* 90 Fed. 186.
>
> "When a sovereign comes into one of its own courts of its own accord, and seeks relief, all the rules established for the administration of justice between individuals are applied and bind all parties."

In *U. S. v. Wilson,* 118 U. S. 86, the government was denied the right to maintain a bill *quia timet* or to remove cloud where not in possession.

Cf. *U. S. v. Bitter Root Dev. Co.,* 200 U. S. 451 (Below 133 Fed. 278),

where it was charged that numerous defendants had cut timber and the court held that a multiplicity of defendants could not deprive each of his right to a trial by jury.

The decision upon which the complainants rely is found in *Coosaw Mining Co. v. State,* 144 U. S. 550.

In this case the Coosaw Mining Company was mining phosphates in the bed of a navigable stream under a license which required the payment of a royalty.

By reference to the terms of the injunction in the court below (47 Fed. 226) it will be seen that it merely restrained defendant from mining until it had taken out a new license under the act of the State of South Carolina of 1890.

There was no allegation of possession or right of possession in the defendant. On the contrary, it was expressly alleged that defendant was not in possession.

Obviously, the phosphates which were being mined, being in the bed of a navigable stream, there could be no possession in defendant or any other private party. The defendant was a mere licensee.

It is this that completely distinguishes the case from those in which the defendant is alleged to be or is in fact in possession, as in the case at bar.

In the Coosaw case there was no prayer for possession or to quiet title. Nor was it urged on the part of defendant that a court of equity had no jurisdiction, because the defendant was in possession but because damages would be an adequate remedy.

Thereupon the court took jurisdiction of the case on the ground of waste, public nuisance, purpresture.

A purpresture is the enclosure of that which should be open to the public at large. Obviously, this is not the ground of complaint in the case at bar. The plaintiff not only contends that the defendant should not be permitted to remain in the possession of these lands, but that no one at all may enter thereon. A public nuisance it cannot be, because there are no allegations to the effect that it is a public nuisance. The question as to whether it constitutes waste or not is ancillary to the primary

question whether the plaintiff or the defendants are entitled to the possession. In the usual action to restrain waste, it is assumed that the defendant is entitled to the possession either as a tenant for years or for life, or as a licensee, but that he is acting contrary to the covenants or conditions under which he holds his estate. An action cannot be brought to restrain waste in a court of equity where there is a contest over possession.

The question whether the defendants in this case are committing waste or not is absolutely dependent on whether the defendants are entitled to the possession or whether plaintiff is entitled to possession. If defendants are entitled to possession free of any right of plaintiff, nothing which the defendants do on the land can constitute waste.

The fundamental question in this case therefore is, Are the defendants entitled to the possession which it is alleged they now hold? And this question under all the authorities whether the government be plaintiff or not should be tried in a court of law with a jury, if defendants demand it.

The case does not belong on the equity side of the court and the court had no jurisdiction to appoint the receiver.

None of the other authorities presented by the plaintiff in any way sustain the points for which they are cited. There is no case which holds that an action in which a plaintiff out of possession seeks relief which involves the transfer of the possession

to him as the result of the suit is one of equitable cognizance.

Counsel's contention that the government may sue in equity to restrain waste or to enforce some public policy as to the public lands assumes in favor of the government the very point before the court for decision, to wit, are these still public lands or do they belong to defendants?

We do not contend that the government is without remedy as learned counsel seems to think. If plaintiff is entitled to the possession of this land an action may be brought in the proper forum or this case may be transferred to the law side and the rights of the parties there adjudicated. If there is any danger that the *corpus* of the property may be destroyed while the action at law is pending, there is ample authority permitting an ancillary suit in equity for an injunction or the appointment of a receiver as the circumstances may warrant.

But the ultimate question of the right to the possession of the land must be tried in an action at law.

By following this procedure, the rights of the government would be amply protected, and at the same time, the defendants will not be deprived of their constitutional rights of a trial by jury.